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OFFICE OF PETITIONS

In re Application of :
O'Donnell et al. :
Application No. 10/673,098 : **ON PETITION**
Filed: September 26, 2003 :
Attorney Docket No. 22221/1090 (RU-339) :

This is a decision on the petition under 37 C.F.R. § 1.137(b), filed October 6, 2009, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to rely in a timely manner to the non-final Office action mailed December 5, 2008, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, by operation of law, the above-identified application became abandoned on March 6, 2009. A Notice of Abandonment was mailed June 23, 2009.

A grantable petition under 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply,
- (2) the petition fee,
- (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information.²

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

The instant petition lacks item(s) (3).

The petition claims in a declaration of Adam Forman that Mr. Forman did not intend to abandon application 10/673,098. However, in Mr. Forman's declaration under item 7, he clearly states that "Accordingly, I determined at this time that I unintentionally provided the wrong instructions to outside counsel stating "do not file a response" to the December 5, 2008, office action for U.S. Patent Application Serial No. 10/673,098". It would appear that the action was intentional.

Where the applicant deliberately permits an application to become abandoned, the abandonment of such application is considered to be a deliberately chosen course of action, and the resulting delay cannot be considered as "unintentional" within the meaning of 37 CFR 1.137(b).

Petitioner may wish to pursue reinstatement of the patent under the unavoidable provisions of 37 CFR 1.137(a). A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); **(3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable;** and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d).

Further correspondence with respect to this matter should be addressed as follows:

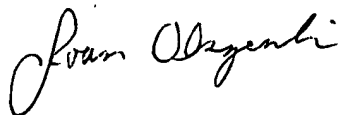
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Any questions concerning this matter may be directed to the undersigned at (571) 272-7751.



Joan Olszewski
Petitions Examiner
Office of Petitions

² See MPEP 711.03(c)(III)(C) and (D).